In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 748

PAUL R. CASAVINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for New Jersey of mail fraud and securities violations in the sale of stock. On June 15, 1965, he was sentenced to imprisonment for a period totalling eight years. The conviction was affirmed on appeal, *per curiam* (Pet. App. A). The petition raises no issues warranting review by this Court.

1. In its charge, the court instructed that "* * * the burden of proving the guilt of the accused beyond

a reasonable doubt is upon the Government and that burden never shifts" (R. 2341a). After explaining the elements of the offenses charged, the court twice said that it was necessary that each element be proved by the government beyond a reasonable doubt (R. 2346a, 2349a-2350a).

Subsequently the court stated (R. 2351a):

> A number of alleged misrepresentations have been charged in the indictment but it is not necessary that all of them be proved. It is necessary only that there be sufficient misrepresentation or omission of material facts or other fraudulent activities to convince you beyond a reasonable doubt that a scheme to defraud was employed or a course of business that would defraud was knowingly engaged in by the defendants in the offer and sale of securities. It therefore is not necessary that all of the allegations of the indictment be proven so long as some of the material allegations are proven. They must be proven though beyond a reasonable doubt.

Petitioner's contention that this latter statement resulted in confusion as to the burden of proof is without merit. The court merely pointed out, correctly, that the government was not required to prove all of the misrepresentations alleged in the indictment. See *Myrick* v. *United States*, 332 F. 2d 279, 280 (C.A. 5), certiorari denied *sub nom. Bergman* v. *United States*, 377 U.S. 952. The court was in no way deviating from its previous instructions that the government had the burden of proving beyond a reasonable doubt all of the elements of the particular

statutory crimes charged. That petitioner's contention is a mere afterthought is shown by his failure at the time of the charge to make the objection now urged (R. 2357a-2358a). Rule 30, Fed. R. Crim. P.; *Lopez* v. *United States*, 373 U.S. 427, 436.

2. There was no improper limitation on cross-examination of a government witness. Cerruti, petitioner's accountant, testified as a government witness on direct examination as to various stockholders' meetings, transfers of corporate shares and property, registration certificates, and misrepresentations in effecting the fraudulent scheme (R. 33a-248a). On cross-examination by petitioner's counsel it was brought out that Cerruti had given a statement to the Securities and Exchange Commission and that he had previously been convicted of forgery, embezzlement, and grand larceny (R. 251a, 254a-257a). Later in the cross-examination the following colloquy occurred (R. 271a):

> Q. Mr. Cerruti, before you took the stand today, and any time prior thereto, did you have an agreement or understanding with the representatives of the Federal Government that in consideration of your testifying in behalf of the Government you would not be indicted as a defendant or prosecuted in this matter?
> A. Quite to the contrary, sir.
> Q. You didn't have that agreement?
> A. Absolutely not.

Petitioner's counsel then said that he wanted to show that "in this indictment he—this witness—is charged in the ten counts, by repetition, as aiding or

conspiring and agreeing with the remaining defendants to commit all these frauds, and that he was never named a defendant, and has never been prosecuted, notwithstanding the charge that he is a co-conspirator. I am entitled to bring that out to show bias, to show interest for his testimony here, under the rules of evidence" (R. 273a). In the colloquy that ensued (Pet. 10-11), the point which counsel sought to establish was clearly brought out. As the Court stated at the conclusion of the discussion (R. 276a):

> Ladies and gentlemen of the jury, this defendant has said that he has not been promised by any official of the S.E.C. or the Government that he would not be tried or that he would not be indicted. He is mentioned as a conspirator with others, but not indicted as such.
>
> Now, that is as far as you can go.

There was no abuse of discretion in this matter.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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